**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 29 March 2004**

**BALCA Case No.: 2003-INA-43**
ETA Case No.: P2000-CA-09508013/JS

*In the Matter of:*

**SUNRISE DRYWALL,**
*Employer,*

*on behalf of*

**ARTURO VALLADARES,**
*Alien.*

Appearance: Luis Sabroso, Esquire
Anaheim, California
For Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

# DECISION AND ORDER

**PER CURIAM.** This case arises from an application for labor certification[1] filed by a drywall installation and finishing company for the position of Drywall Installer. (AF 19-20).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF").

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

## STATEMENT OF THE CASE

On August 2, 1999, Employer, Sunrise Drywall, filed an application for alien employment certification on behalf of the Alien, Arturo Valladares, to fill the position of Drywall Installer. Minimum requirements for the position were listed as two years experience in the job offered. (AF 19-20).

Employer received one applicant referral in response to its recruitment efforts; Employer rejected that applicant for failure to appear for the scheduled interview. (AF 31-35).

The CO issued a Notice of Findings ("NOF") on June 24, 2002, proposing to deny labor certification based upon a finding that U.S. applicant Price did not appear to have been rejected for lawful, job-related reasons. (AF 15-17). The CO observed that an interview letter sent to applicant Price advising him to appear for a scheduled interview was discouraging in nature; thus, it did not appear that Employer had made a good faith attempt to recruit this U.S. worker. The CO cited the fact that the letter advised the applicant to report for an interview at Sunrise Drywall, but it was signed by staff for the Law Center of Luis A. Sabroso. In addition, the letter required the applicant to bring proof of citizenship, permanent residence card or authorization for employment, along with experience letters of qualification, which the CO found onerous and discouraging. (AF 16-17).

In Rebuttal,[3] Employer stated that he called the applicant within the time prescribed by the local office, advised the applicant that he would be receiving a letter inviting him to interview, and sent the applicant the interview letter advising him of the time, date and place of the scheduled interview. (AF 9). Employer further asserted that he was justified in requesting proof of legal right to work and letters of recommendation

[2]"AF" is an abbreviation for "Appeal File."

[3] Employer filed a request for extension in time to complete rebuttal, dated July 27, 2002, stamped received August 1, 2002, which was denied by the CO on August 1, 2002. (AF 12-13). Employer thereafter

because his ad requested a "resume/qualification letter" and stated "[i]f offered employment must show legal right to work." (AF 8-10).

The CO issued a Final Determination ("FD") denying labor certification on August 30, 2002, based upon a finding that Employer had failed to adequately document lawful rejection of applicant Price. The CO concluded that because Employer's letter contained discouraging requirements, Employer did not demonstrate a good faith attempt to recruit and failed to show that the applicant was truly unavailable. The CO noted that the appointment letter was sent by the immigration law firm, and hence, because of the sender, may have been discouraging. The CO also noted that there was no stated requirement for written letters of recommendation on the application for labor certification and that the law firm's letter asking for proof of authorization to work prior to being interviewed and offered the job was inappropriate and discouraging. (AF 7).

By letter dated September 17, 2002, Employer filed a Request for Review and the matter was docketed in this Office on December 24, 2002. (AF 1). Employer filed a Statement of Position on March 11, 2003.

## DISCUSSION

Twenty C.F.R. § 656.21(b)(6) states that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful, job-related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*).

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submitted his rebuttal dated August 14, 2002, stamped received August 28, 2002, which was found to be untimely, but nonetheless considered by the CO. (AF 7-11).

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

When an applicant's resume raises a reasonable possibility that he/she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *Ceylion Shipping, Inc.,* 1992-INA-322 (Aug. 30, 1993); *Messina Music, Inc.,* 1992-INA-357 (July 20, 1993); *M.S.O. Dev. Corp.,* 1992-INA-326 (July 30, 1993). The employer's responsibility to investigate can be accomplished by interview or other means. Under certain circumstances, such other means may include sending the applicant a written request for clarifying information. However, whatever means are utilized by the employer, they may not place unnecessary burdens on the recruitment process, be dilatory in nature, or otherwise have the effect of discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.,* 1994-INA-606 (Sept. 12, 1995).

In the instant case, Employer failed to demonstrate that it recruited workers in good faith. In its letter of contact, Employer required that the prospective applicant provide several items of documentation which may not have been readily available or easily obtainable. Where the applicant is a U.S. citizen, the applicant may not know what is required for proof of authorization to work and could be discouraged by the request. Moreover, an applicant may not be in possession of letters of recommendation. The applicant provided telephone numbers of former employers on his resume; Employer could have contacted these references or asked for additional reference names and numbers at the time of interview. Notably, Employer made no effort to follow-up on the contact letter. Therefore, it was Employer's actions that discouraged applicant Price and

as such, Employer has not shown that he was truly unavailable. On this basis, Employer has not met his burden of proof and labor certification was properly denied.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.